United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

77-7215

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

B

JAY BLUM,
Plaintiff-Appellant

vs.

PROBATE COURT OF CHITTENDEN COUNTY, et al,
Defendants-Appellees

Civil Appeal
Docket No. 77-7215

APPELLANT'S APPENDIX

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DOCKET ENTRIES

June 11, 1976	Summons, Complaint, Order and Affidavit filed with the Court
June 22, 1976	Plaintiff's Memorandum in Support of Temporary Restraining Order
June 22, 1976	Amended Complaint and Affidavit with attachments, Motion, Goldhaber's Memorandum in Opposition to a Tro
July 6, 1976	Answer of defendants Goldhaber and Motion to Dismiss by Polworth and Cain, Memorandum Accompanying Defendant's Motion to Dismiss for Failure to State a Claim upon Which Relief can be granted
July 21, 1976	Answer to Complaint by defendant Handy
August 3, 1976	Memorandum Opinion and Order by Judge Coffrin
August 23, 1976	Order signed by Judge Coffrin
September 3, 1976	Memorandum in Opposition to Honorable John L. Cain's Motion to Dismiss
December 21, 1976	Motion to Amend Complaint, Memorandum Supporting Dismissal as Against Defendants Goldhaber and Motion to Withdraw as Counsel
January 14, 1977	Motion to Dismiss by Defendant Handy to dismiss the action and Memorandum in Support of Defendant Handy's Motion to Dismiss
February 22, 1977	Opinion and Order
March 4, 1977	Plaintiff's Motion to Amend Findings and Judgment
March 15, 1977	Motion to Withdraw as Counsel by plaintiff's attorney
March 16, 1977	Opposition to Plaintiff's Motion to Amend Pursuant to F.R.C.P. 52(b) and Defendant's Goldhaber Memorandum of Law

March 17, 1977	Letter to Edward Trudell from plaintiff (appearing pro se)
March 21, 1977	Appeal to the U.S. Court of Appeals, Second Circuit by plaintiff
March 28, 1977	Order by Judge Coffrin
April 4, 1977	Memorandum in Support to Amend Judgment and Findings
April 7, 1977	Letter to Edward Trudell from plaintiff re Memorandum
April 13, 1977	Financial Affidavit filed by plaintiff
April 14, 1977	Motion to Extend Time for Transmission of Record Pursuant to Rule 11(b) of the Federal Rules of Appellate Procedure by plaintiff Jay Blum
April 18, 1977	Motion for Leave to Appeal in Forma Pauperis by Appellant Jay Blum and Affidavit in Support of same
April 20, 1977	Order Extending Time to Docket the Record on Appeal by Judge Coffrin
April 21, 1977	Affidavit of Jay Blum and attachments
April 22, 1977	Order of Judge Coffrin and Opinion and Order
May 19, 1977	Notice of Appeal to the United States Court of Appeals for the Second Circuit by Plaintiff-Appellant Jay Blum
June 3, 1977	Order
June 23, 1977	Notice of Appeal to the United States Court of Appeals for the Second Circuit
July 12, 1977	United States Court of Appeals Order

U.S. Dist. Ct.
Dist. of Vermont
Feb. 22, 1977 3:09

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JAY BLUM

vs.

PROBATE COURT OF CHITTENDEN COUNTY, VERMONT; L. JOHN CAIN, JUDGE OF CHITTENDEN PROBATE COURT; JOSEPH HANDY COMMISSIONER, VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, and DALE AND JEANNE GOLDHABER OF BURLINGTON, VERMONT

Civil Action
File No. 76-130

OPINION AND ORDER

This action under 42 U.S.C. §1983 and 28 U.S.C. §2241 challenges the constitutionality of various judicial proceedings which resulted in the termination of plaintiff's parental rights and the subsequent adoption of his son, Dan Blum, by defendants Dale and Jeanne Goldhaber. The case arose in Massachusetts where both the plaintiff and his son were previously domiciled. It has come to this Court after a final judgment was reached in Massachusetts courts and in the Probate Court of Chittenden County, Vermont.

The original defendants in the present case were the Probate Court of Chittenden County, Vermont, Hon. L. John Cain, Judge of the Probate Court of Chittenden County, Paul Philbrook, Vermont Commissioner of Social Welfare, Robert Polworth, Clerk of the Superior Court of Chittenden County, and Dale and Jeanne Goldhaber, the adoptive parents of David Dan-Israel Blum. Plaintiff amended his complaint on June 22, 1976 to substitute Joseph Handy, Vermont

Commissioner of Social and Rehabilitation Services, as a defendant in place of Paul Philbrook.

On August 3, 1976 this Court dismissed the action as to defendant Polworth on the grounds that there was no allegation that in simply performing his official duties as Clerk of the Superior Court, he had engaged in "any conduct violative of Blum's constitutional rights." The Court considered but reserved ruling on defendant Cain's motion to dismiss.

Before the Court at this time are motions to dismiss of defendants Goldhaber, Hon. L. John Cain and Joseph Handy. For the reasons set forth below, each defendant's motion to dismiss is granted.

According to plaintiff's amended complaint and construing the allegations therein in plaintiff's favor, the essential facts are as follows:--

David Dan-Israel Blum was born on September 30, 1968. In October 1972, his mother took her own life, leaving Dan in the care of his naturally grief-stricken father. This loss, as well as a "hereditary sleep disorder" caused plaintiff to voluntarily admit himself to two mental health units in the Boston area during the period of December 1972 through February 1973. In March 1973, the Avon Home, a licensed child placement agency, was awarded custody of Dan Blum by the Probate Court of Middlesex County, Massachusetts. Six months later Cambridge (Mass) Family and Child Services, successor to the Avon Home, petitioned the Court to place Dan Blum for adoption without the consent of his natural father. Jay Blum was notified of the upcoming hearing on that petition, and was represented by counsel, but did not appear at the hearing or in any way contest the petition. Apparently advised

by a physician that he would be unable to prevail at the hearing and that the only was he could be reunited with his son was by kidnapping the boy and absconding, plaintiff became "distraught" and, after unsuccessfully attempting to kidnap his son, immediately left the country for Israel. In his absence, the Middlesex Probate Court on August 29, 1974, ordered that the adoption could proceed without plaintiff's consent.[1]

After returning to the United States, plaintiff petitioned the Massachusetts Supreme Judicial Court for leave to file a late appeal, M.G.L.A., C.215 and 15. The petition was denied without opinion on August 12, 1975. In the meantime, Dan Blum was transferred to the Vermont Department of Human Services, which consented to his adoption by the Goldhabers, who were and are Vermont residents. On May 5, 1975, with the consent of defendant Joseph Handy, Vermont Commissioner of Social and Rehabilitation Services, defendant Hon. L. John Cain, Judge of the Chittenden County Probate Court ordered that Dan Blum be adopted by defendants Dale and Jeanne Goldhaber.

The judicial proceedings affecting Dan Blum have spanned nearly four years; in both Massachusetts and Vermont the inexorable drift of the proceedings has been toward the termination of plaintiff's parental rights with respect to his son and Dan's commencement of a new life with his adoptive family. Even when looking at the record in the light most favorable to the plaintiff, one cannot escape the conclusion he himself bears the primary responsibility for this situation.

Plaintiff finds himself prosecuting this lawsuit primarily because of a grievous misjudgment he made in failing to appear and be heard at the final hearing in the Middlesex (Mass) Probate

Court in April of 1974. The proceedings which have subsequently taken place have borne the mark of this initial default.[2] The time to appeal the Massachusetts decree expired, his petition for late appeal was denied, and now it is too late to appeal in Vermont as well. Plaintiff himself points out that "a suit under the Civil Rights Act and in particular Section 1983, is perhaps (his) sole means of litigating the very important constitutional issue surrounding the termination of the parent-child status by the Massachusetts Probate Court." Plaintiff's Memorandum in Support of Temporary Restraining Order, at 3.

A parent's interest in his or her children is one which the law recognizes and protects. In Stanley vs. Illinois, 405 U.S. 645 (1972), the Supreme Court said, "The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed 'essential,' . . . 'basic civil rights of men,' and rights 'far more precious than property rights'. . ." 405 U.S. 645, 651 (Citations omitted). It follows from the importance of the interest that State intervention in matters pertaining to the parent-child relationship under the parens patriae doctrine must be attended by due process of law.[3] Both "liberty" and "privacy" rights have been found in the parent-child relationship to compel the conclusion that the family unit is protected by the Due Process Clause of the fourteenth amendment, the Equal Protection Clause of the fourteenth amendment, and the ninth amendment.[4]

The phrase "Due Process", while denoting a "primary and indispensible foundation of individual freedom,"[5] owes most of its meaning to the word "due." In our federal system, a party's

right to seek redress for alleged grievances in many cases extends beyond a single hearing of his cause. But it is obvious that there must come a point in legal proceedings when the judgment of a court becomes final so that the parties may rely upon it in arranging their affairs. No person may be legally deprived of any rights or procedures due him by the state, but neither may the state or any opposing party be deprived of its right to have litigation come to an end following proceedings embodying the fair and impartial application of the principles of law which define due process.

There is a second equally important area of jurisprudence involved in this case. The constitutional doctrine of full faith and credit requires that a court in one state recognize and give full effect to "public acts, records, and judicial proceedings" of a sister state. U.S. Const. art IV §1. But it is well-settled law that a sister state's judicial proceedings shall be given such full faith and credit only if the sister state's court had personal and subject matter jurisdiction.

Finally, this is a federal civil rights case which brings into play the peculiar requirements of 42 U.S.C. §1983. Of particular concern here is the provision of that statute which limits the aggrieved party to relief for deprivation of his rights effected by persons "under color of" state law.

With these considerations in mind, we proceed to the pending motions to dismiss.

DEFENDANTS DALE AND JEANNE GOLDHABER

The complaint fails to state a claim under 42 U.S.C. §1983 upon which relief can be granted with regard to the Goldhaber defendants since it is not alleged that they engaged in any unconstitutional conduct "under color of" state law not has there been any allegation that the Goldhabers are engaged in a "public function" or are conspiring with state officials to deprive plaintiff of his constitutional rights. See, e.g. Perez vs. Sugarman, 499 F. 2d 761, 764 (2d Cir. 1974); Sykes vs. California, 497 F. 2d 197, 199-200 (9th Cir. 1974). The Second Circuit, in dicta, has suggested that state action is a jurisdictional pre-requisite to the maintenance of a §1983 action. See Perez vs. Sugarman, supra, 499 F.2d at 764. [Other circuits, however, have indicated that the proper disposition is to dismiss the claim pursuant to Fed. R.Civ. P. 12(b)(6). See Anastasia vs. Cosmopolitan National Bank, 527 F.2d 150, 153 n.8 (7th Cir. 1975), cert. denied, _____U.S. _____, 96 S.Ct. 1143, 44 U.S.L.W. 3473 (Feb. 23, 1976), and authority cited therein.] In any event, the relief requested is not available against private persons such as the Goldhabers because there is simply nothing in the record to support a conclusion that they acted to deprive plaintiff of his civil rights under color of state law. They were simply the willing providers of the new home which the duly authorized agents of the States of Massachusetts and Vermont determined that Dan Blum should have.

Plaintiff also invokes the jurisdiction of 28 U.S.C. §2241 (habeas corpus). The Goldhaber defendants point out, however, that even if jurisdiction may technically exist under §2241, this Court should not exercise that jurisdiction because of the historic

practice of federal courts to abstain from hearing matters of domestic relations. [6]

The question of whether §2241 gives us subject matter jurisdiction as to the case against the Goldhabers turns in part on the degree of "governmental involvement in facilitating and maintaining the allegedly illegal physical and legal custody exercised respectively by the foster parents and adoption agencies." Nguyen Da Yen vs. Kissinger, 528 F. 2d 1194, 1203 (9th Cir. 1975). Nguyen Da Yen was a unique case involving the Vietnam "Babylift" where the Ninth Circuit in what was termed a "mass child custody proceeding," determined that federal court jurisdiction existed under 28 U.S.C. §2241. The Court pointed out that the Great Writ, habeas corpus ad subjiciendum was "even in Blackstone's time a remedy 'in all manner of illegal confinement' including false imprisonments by private persons." Id., at 1202. Despite the fact that "most private detentions (and child custody conflicts) do not rise to the level of constitutional violations," the Court found that federal habeas jurisdiction was proper in the case where the Government was deeply involved in the entire operation. Id., at 1202.

The habeas jurisdiction invoked in Nguyen Da Yen is not appropriate in this case for two reasons. First, the record simply fails to demonstrate that any illegal detention is present in this case. In addition, the facts of this case as outlined above are completely distinguishable from those in Nguyen Da Yen, especially in that the Government and the adoptive parents surely stand in an entirely different relationship in the instant case than they did in Nguyen Da Yen. In short, even if the doctrine of federal court abstention in domestic relations cases does not jurisdictionally

bar federal habeas in some such cases, it is clear that the circumstances of this case do not spell out any claim for habeas relief.

The Goldhaber defendants also argue that the Commonwealth of Massachusetts or an agency thereof is an indispensible party, or at least a necessary party under Fed. R. Civ. P. 19. While this may be the case, there is no need to reach a determination on that issue when it is amply clear that the complaint states no cognizable cause of action against the Goldhabers under 42 U.S.C. §1983 or 28 U.S.C. §2241.

DEFENDANT HON. L. JOHN CAIN

Plaintiff's initial theory supporting his inclusion of Judge Cain as a defendant is that, in ordering the adoption of Dan Blum by the Goldhabers while appeals were pending in Massachusetts, and without notice to the plaintiff, Judge Cain violated the Fourteenth Amendment to the United States Constitution.

On the motion to dismiss, the Court must take the well-pleaded factual allegations as true. Walker Process Equipment vs. Food Machine and Chemical Corp., 382 U.S. 172 (1965). Even doing so, however, the law as applied to these facts does not support a cause of action against Judge Cain.

Defendant Cain contends that, under the full faith and credit clause of the United States Constitution, Article IV, §1, he was compelled to honor the Massachusetts judgment upon which the subsequent adoption proceedings were based. Since Mills vs. Duryee, 11 U.S. (7 Cranch) 481 (1813), judgments of sister states have been held entitled to be given the same effect as they would have in the forum where rendered. See, e.g. Adam vs. Saenger,

303 U.S. 59 (1938); Hanley vs. Donaghue, 116 U.S. 1 (1885). Usually this rule requires not only that the second forum bar an attempt to relitigate the same claim, but also that it give binding effect to the litigated issues of the first judgment in subsequent, but different suits.[7] In Milliken vs. Meyer, 311 U.S. 457 (1940) reh. denied 312 U.S. 712 (1940), the Supreme Court held that when a judgment on its face appears to be that of a court with jurisdiction over the case, the full faith and credit clause precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. "Whatever mistakes of law may underlie the judgment, (Cooper vs. Reynolds, 10 Wall. 308) it is 'conclusive as to all the media concludendi,' Fauntleroy v. Lum, 210 U.S. 230, at 237." Milliken vs. Meyer, Id., at 462.

However, one aspect of a sister state's judgment which courts have been able to re-examine is jurisdiction. See e.g. Milliken vs. Meyer, Id. If there was no jurisdiction over the person or subject matter in the forum which rendered the initial judgment, that judgment would not be entitled to enforcement in another State, see e.g., Williams vs. North Carolina, 325 U.S. 226, reh. denied 325 U.S. 895 (1945). However, plaintiff himself points out in his Memorandum in Support of a Temporary Restraining Order at 3, that he does not dispute the Massachusetts Probate Court's having acquired jurisdiction over him and his son, Dan, as well as over the subject of the parental rights at stake. Thus, by plaintiff's own admission, the one aspect of the Massachusetts judgment into which the Vermont court theoretically have inquired in order to find a basis for refusing to give it full faith and credit was not in question in this case.

Plaintiff suggests that, because the Massachusetts judgment was based upon proceedings which did not provide plaintiff with adequate due process safeguards, surely Judge Cain was not obligated to give it full faith and credit, citing May vs. Anderson, 345 U.S. 528 (1953). That case is clearly distinguishable and not directly on point for plaintiff's proposition. It simply held that in a habeas corpus proceeding attacking the right of a mother to retain custody of her minor children, an Ohio court was not bound to give full faith and credit to a Wisconsin decree awarding custody of the children to their father when the decree was obtained by the father in an ex parte divorce action in a Wisconsin court which had no personal jurisdiction over the mother.

Despite his admission in his Memorandum in Support of a Temporary Restraining Order that the Notice he received for the Massachusetts proceeding was in no way defective, plaintiff's complaint alleges that notice was not specific enough to confer jurisdiction on the Massachusetts Probate Court. The full faith and credit effect of such a situation was treated in detail in Griffin vs. Griffin, 327 U.S. 220 (1946), where a judgment of alimony arrears was docketed with no notice to the defendant. The Court declared that the want of notice equalled a want of procedural due process, and "hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment in personam against him." 327 U.S. 220, 228. Thus, the Court concluded, "[s]ince by virtue of the due process clause the judgment is ineffective in New York to adjudicate petitioner's rights for enforcement purposes, it cannot be made the instrument for enforcing elsewhere the obligation purportedly adjudicated by it". Id., at 232. However, in Griffin the motion to enter

a money judgment for arrears in alimony was granted completely ex parte, with no notice to or service of process on the defendant at all. Here, by plaintiff's own admission, notice was given, an opportunity to be heard was provided, and plaintiff--of his own volition--failed to appear.

Plaintiff also commends to this Court "for detailed study" the case of Alsagner vs. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa, 1975) where notice given in an adoption proceeding was found not sufficient under due process standards. Alsagner involved the termination of parental rights "in and to" five of six of the children of an Iowa couple adjudged to have neglected those children. Upheld in the Iowa Supreme Court, the termination order was attacked in federal court under §1983. After hearing evidence, the District Court determined that federal declaratory relief would be inappropriate, 384 F. Supp. 643 (1974) but was reversed on appeal, 518 F. 2d 1160 (8th Cir. 1975). On remand, the District Court held that the Iowa parental termination statutes were vague both on their face and as applied, that substantive due process was denied by failure of the authorities to show a "high and substantial degree of harm" to the children, and that procedural due process was denied by inadequate notice and standard of proof.

Comparing Alsagner to the Massachusetts proceedings in the instant case, two questions must be answered. First, were the Massachusetts proceedings riddled with due process deprivations, like those in Alsager? Second, was plaintiff in any way prejudiced by any due process defects which might be uncovered?

In answer to the former question, the record indicates the following:

(a) Plaintiff admits that he received notice prior to the Massachusetts proceeding. (Amended Complaint, paragraph 11, at 4).

(b) Plaintiff admits that the notice he received was in no way defective (Memorandum in Support of Motion for Temporary Restraining Order, at 3).

(c) Plaintiff does not dispute that the Massachusetts Probate Court acquired jurisdiction over him and Dan. (Memorandum in Support of Motion for Temporary Restraining Order, at 3).

(d) The notice received by plaintiff consisted of a copy of the petition to place his son for adoption without parental consent. The petition, after reciting identifying information, simply indicated "that the best interests of said child requires that it be placed for adoption, and the best interests of said child require that consent of the father . . . shall not be required."

(e) Plaintiff admits that he was represented by counsel, but failed to appear at the proceeding. (Amended Complaint, paragraph 14, at 4)

(f) Plaintiff alleges that the order terminating parental consent was based on hearsay and prejudicial evidence. (Amended Complaint, paragraph 17, at 5).

(g) Plaintiff alleges that there was no showing of any risk of "imminent serious physical or sustained and permanent emotional harm" in his retaining custody of his son. (Amended Complaint, paragraph 18, at 5).

Comparing the record here with the Alsager facts, one major similarity and one major difference stand out. The similarity is that the quality of the notice provided in the Massachusetts proceedings was probably as poor as the notice in Alsager. The notice given Jay Blum could be described as "vague and conclusory," as the Alsager court found the notice in that case to be. 406 F. Supp. 10, at 25.

The difference between the cases involves the question of prejudice. In Alsager, the parents evidently never abandoned the children or the case, fled the country, or ignored court proceedings of which they had notice, whereas the plaintiff here did all of those things. This fact strongly militates against any voiding of the Massachusetts judgment for alleged inadequacy of notice. It is abundantly clear that Jay Blum at least had notice of the type of proceeding which was to take place, and even discussed it with his psychiatrist. He could easily have entered his objection to the sufficiency of the notice at the hearing, but instead not only failed to appear, but removed himself from the country. Any possible inadequacy in due process which the Massachusetts Probate Court visited upon Jay Blum was outweighed by the inadequacy of Jay Blum's own handling of his responsibilities.

In this case, then, no failure of due process occurred which could undermine the Massachusetts court's jurisdiction and, therefore, deprive the Massachusetts judgment of its entitlement to full faith and credit. Thus, Judge Cain, by ordering the adoption without plaintiff's consent because of his determination that the Massachusetts judgment was entitled to full faith and credit, did not act under color of state law to deprive plaintiff of his constitutional rights.

Plaintiff alleges that the entry of the adoption decree in Vermont while the petition for late appeal was pending in Massachusetts constituted another (or alternative) violation of his constitutional rights. It has been held in

this circuit that, "[s]urely to be res adjudicata, after affirmance on appeal, [a judgment] must be held to be res adjudicata at the time the judgment was entered in the court below. It continues to be res adjudicata until reversed on appeal." United States v. Nysco Laboratories, Inc., 215 F. Supp. 87, 89 (E.D.N.Y. 1963), aff'd 318 F.2d 817 (2d Cir. 1963). This seems not only a logical approach in this case, but particularly appropriate in light of plaintiff's failure to make a timely appeal and the resultant great delay he himself caused between final judgment and appeal.

In his amended complaint, plaintiff says that defendant Cain's failure to notify him of the proceedings in Chittenden Probate Court constituted a denial of due process of law. Defendant responds by claiming that this "failure" was proper and in no way constitutionally infirm.

The relevant Vermont statutes clearly allow an adoption to be decreed without notice to the parent of a minor in certain limited circumstances, as obtained here.[8/] Griffin v. Griffin, 327 U.S. 220, 234 (1946), cited supra, at 10, alluded to a similar situation regarding notice. The judgment attacked in that case had two components--it confirmed an earlier order by which the defendant/petitioner was already bound, and it foreclosed defenses going to the discharge of the obligation established by the previous order, and arising since its date. We have already discussed its second component, supra, at 10. The Court, in addressing the question of notice regarding confirmation of the earlier order, said:

> The 1938 [second] judgment, so far as it confirmed the 1936 order by which petitioner was already bound,

impaired no rights of petitioner and foreclosed no defense which he had not had opportunity to offer. Due process does not require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given.

327 U.S. at 233.

The Supreme Court in a 1965 adoption case reiterated its view that due process requires notice and an opportunity to be heard "appropriate to the nature of the case." Armstrong v. Manzo, 380 U.S. 545, 550 (1965), citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1949). And in a 1961 case affirming the dismissal of an action for failure of one party's counsel to appear at a pretrial conference, the Supreme Court said:

> It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." [Citation omitted.] But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

Link v. Wabash Railroad Co., 370 U.S. 626, 632 (1961), rehearing denied, 371 U.S. 873 (1962).

Judge Cain, in viewing the circumstances of this case as it arose, and endeavoring to abide by the express authority of the Vermont adoption statute, acted in a manner not inconsistent with plaintiff's due process rights in implementing the final Massachusetts decree.

For the foregoing reasons, defendant Hon. L. John Cain's motion to dismiss is granted.

DEFENDANT PROBATE COURT OF CHITTENDEN COUNTY

Plaintiff recognizes that the probate court is the duly constituted body exercising authority to order adoptions in Vermont, 15 V.S.A. § 434. Amended Complaint, at 2. Defendant Cain, as Judge of the Probate Court with jurisdiction over this case, acted pursuant to the power vested in his court by statute in ordering the adoption of Dan Blum. Having determined that defendant Cain's order was premised on a Massachusetts decree which was entitled to be given full faith and credit, we find no claim against the Probate Court of Chittenden County upon which relief can be granted. Therefore the complaint is dismissed as to the Probate Court of Chittenden County.

DEFENDANT JOSEPH HANDY

Plaintiff's only allegation against the Commissioner of the Department of Social and Rehabilitation Services, Joseph Handy, is that he violated plaintiff's fourteenth amendment rights by consenting to the adoption of Dan Blum in reliance on the Middlesex Probate Court's allegedly unconstitutionally obtained order. Defendant Handy denies having participated in the decision to terminate plaintiff's parental rights or having engaged in conduct leading to that termination. He also states that his action in consenting to the adoption of Dan Blum was fully authorized by 15 V.S.A. § 435(6). In following the direction of that statute he was accepting the finality and validity of a Massachusetts judgment which he had no authority to question or attack.

Plaintiff's amended complaint fails to state a claim against defendant Joseph Handy upon which relief can be

granted. Even assuming arguendo that defendant Handy was intimately enough involved in effecting the termination of plaintiff's parental rights to have been in a position to "subject" plaintiff to a deprivation of his civil rights,[9/] he is not, as a member of the executive branch of the Vermont state government, authorized or required to look behind a sister state's judgment for constitutional defects in procedure before he may rely thereon in Vermont. In fact, the mandate of the Constitution could not be much clearer:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other state.

U.S. Const. art. IV, § 1. While the implementing legislation found in 28 U.S.C. § 1738 states that full faith and credit shall be given by every court within the United States, it would not make sense to require that a state agency inquire into the validity of the foreign judgment and deny the foreign judgment the faith and credit that its own state's courts would have to accord it. Because we find that he had no authority or reason to question the validity of the Massachusetts decree, defendant Handy's consent to the adoption of Dan Blum pursuant to 15 V.S.A. § 435(6) did not constitute a deprivation of plaintiff's civil rights. Accordingly, the motion of defendant Joseph Handy to dismiss the complaint is granted.

For the foregoing reasons, it is ORDERED that the motion of defendants Dale and Jeanne Goldhaber to dismiss the complaint is granted. The motion of defendant Hon. L. John Cain to dismiss the complaint is granted. The motion of

of defendant Joseph Handy to dismiss the complaint is granted. The complaint against the Probate Court of Chittenden County is dismissed.

Dated at Burlington in the District of Vermont, this 22nd day of February, 1977.

Albert W. Coffrin
District Judge

FOOTNOTES

1/ A more complete and revealing chronology follows:

September 30, 1968	David Dan-Israel Blum born.
October 30, 1972	Dan's mother commits suicide.
November 14, 1972*	Dan placed in Avon Home by father.
December 1972 & January 1973	Jay Blum (plaintiff here) voluntarily enters mental hospital
March 6, 1973	Temporary custody granted to Avon Home.
November 27, 1973	Cambridge Family and Child Services petitions to dispense with father's consent to adoption.
April 9, 1974	Final hearing set; father notified and represented by counsel, but does not appear. Instead he leaves for Israel.
August 29, 1974	Middlesex Probate Court (Mass.) order; adoption to proceed without father's consent.
September 1, 1974	Dan begins living with defendants Goldhabers.
March 22, 1975	Father's counsel petitions for late appeal with Massachusetts Supreme Judicial Court.
May 5, 1975	Dan transferred to Vermont Department of Human Services which consents to his adoption by Goldhabers. Adoption decreed in Chittenden Probate Court.
August, 1975	Late appeal denied by Massachusetts Supreme Judicial Court.

*From November 14, 1972 until September 1, 1974 Dan Blum lived in various foster homes. From September 1, 1974 to the present he has lived with the Goldhabers.

November, 1975 — Jay Blum writes to Goldhabers and attempts to contact Dan.

March, 1976 — Goldhabers file suit in Chittenden Superior Court seeking injunctive relief and damages ($500,000) against Jay Blum.

2/ There is nothing in the record to indicate that plaintiff was incompetent by reason of any mental disorder at the time he failed to protect his parental interests in the Massachusetts courts. He was never committed to a mental hospital, nor was he adjudicated to be insane or incompetent at any time, according to the record before us. No attempt was made by himself, his family, his counsel, or his physicians to have a guardian appointed to protect his legal interests, including his interest as a parent in the custody of his son. Finally, it appears that he was in Israel from April to December, 1974, during which time he effectively abandoned his son and took no action to assert his rights to have custody returned to him.

It is not within the province or power of this court to conduct a belated inquiry into plaintiff's mental state and degree of competence at the time of the Massachusetts proceedings in late 1973 and early 1974. These are matters which could have been raised much more effectively at the time of the proceedings, or in the petition to file a late appeal in the Massachusetts Supreme Judicial Court.

3/ See generally, Ketcham and Babcock, Statutory Standards for the Involuntary Termination of Parental Rights, 29 Rutgers L. Rev. 530, 534 (1976); Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 15 (S.D. Iowa, 1975) and cases cited therein.

4/ See e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (affirming the enjoining of Oregon statute deemed to interfere with liberty of parents and guardians to direct upbringing and education of children under their control.) Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating statute allowing sterilization of habitual criminals); May v. Anderson, 345 U.S. 528 (1953) (denying full faith and credit to ex parte custody decree); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) invalidating mandatory leave provisions for pregnant school teachers because of interference with decision to raise a family); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding right of parents to have children taught the German language). See also Alsager v. District Court of Polk Co., Iowa, 406 F. Supp. 10 (S.D. Iowa, 1975).

5/ In re Gault, 387 U.S. 1, 20 (1966).

6/ For a comprehensive analysis of the doctrine of abstention in matters of family law, see Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968). See also Magaziner v. Montgomo, 468 F.2d 782, 787 (3d Cir. 1972); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968); In re Burrus, 136 U.S. 586 (1890).

7/ J. Torke, Res Judicata in Federal Civil Rights Actions Following State Litigation, 9 Indiana L. Rev. 543, 573 (1976). See generally the discussion of Full Faith and Credit, at pp. 573-575.

8/ 15 V.S.A. § 441 reads in part as follows:

> After the expiration of such trial period, or after receipt of a recommendation or filing of a certificate for immediate hearing in accordance with the provisions of the preceding section, the court shall set a date for a hearing on the proposed adoption and cause written notice thereof to be given, either by delivery in person or by mail addressed to his last known address, to each person or agency signing the petition for adoption, to the department of social and rehabilitation services and to the living natural parents of the minor to be adopted; provided, however, that such notice shall not be given to the parent or parents when the minor has been committed to the care and custody of the department of social and rehabilitation services or a licensed child placing agency by a court of this state without limitation in respect to adoption, ...

15 V.S.A. § 435 reads in part as follows:

> Except as hereinafter otherwise provided, if the person to be adopted is a minor, consent to the adoption shall be given, and the final adoption decree executed on the part of the minor, by both of his parents or by the surviving or sole parent. Such consent and decree shall be sufficient when given and executed:
>
> * * *
>
> (6) By the department of social and rehabilitation services of this state or its counterpart in another state, if the minor has been committed to the care and custody of such department by a court of competent jurisdiction without limitation in respect of adoption, or if the minor has been relinquished to it in accordance with applicable state law;
>
> * * *
>
> (10) By the department of social and rehabilitation services when so authorized by a public agency or licensed child placing agency of another state having jurisdiction of a child whose adoptive parents are residing in Vermont.

9/ It is not necessary to decide this question. However, because it is the validity of the Massachusetts decree which determines whether plaintiff's parental rights were wrongly terminated, and because the decree antedated any action by defendant Handy, it is difficult to see how defendant Handy could be said to have subjected plaintiff or caused him to be subjected to a deprivation of his civil rights.

v.) Civil Action
)
Probate Court of Chittenden)
County, Vermont, et al.) File No. 76-130
)

MOTION TO AMEND COMPLAINT

The Plaintiff moves to amend his complaint in this cause as follows:

1. By adding to the allegations of Paragraph 10 of the Amended Complaint the following:

"Said Probate Court granted the petition without notice to Jay Blum and without holding an evidentiary hearing of any kind."

2. By adding an additional paragraph to be numbered Paragraph 13.1 to read as follows:

"13.1 Upon gaining custody of Dan Blum, Cambridge Family and Children's Services immediately attempted to find adoptive parents for him; did make arrangements with the Defendant Goldhaber for placement and adoption; and made every effort to effect this adoption without regard to Plaintiff's parental rights."

3. By adding an additional paragraph to be numbered Paragraph 16.1 to read as follows:

"16.1 Said decree, a copy of which is attached and made a part of this Complaint, recites that Jay Blum withdrew his objections to said decree being entered. The basis for said decree, therefore, was that Jay Blum consented to it. Jay Blum never consented to it. Jay Blum never consented in law or in fact to entry of a decree dispensing with his consent to an order terminating the necessity for consent to adoption of his son."

4. By deleting Paragraph 18 and substituting therefore the following:

"18. At no time was an evidentiary hearing held prior to the entry of the decree dispensing with Jay Blum's consent; and at no time was notice of any kind given or attempted to be given to Jay Blum of the Court's intention to issue said decree with or without a hearing."

5. By adding an additional paragraph 35 to read:

"35. The Middlesex County Probate Court violated Plaintiff's rights under the 14th Amendment of the United States Constitution by: (1) granting the Cambridge Family Services petition for temporary custody without notice or hearing and (2) by basing its final decree on a finding of consent by the Plaintiff when no consent was ever given; and (3) by entering a final decree without notice and without an evidentiary hearing of any kind.

Dated: December 21, 1976.

Jay Blum

By Kimberly B. Cheney

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Cheney, Brock & Sidel
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cc: Greg E. Studen, Esq.
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Richard Finn